United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7113

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ANTHONY IODICE and THORNWOOD EXCAVATORS AND MOVERS, INC.,

Plaintiffs-Appellants,

-against-

PETER CALABRESE, individually and as Secretary-Treasurer of Teamsters and Chauffeurs Local No. 456, International Brotherhood of Teamsters,

Defendants-Appellees.

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APPEAL DOCKET NO. 76-7113

(67 Civ 887)

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P/S

DEFENDANTS-APPELLEES BRIEF

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ISSUE PRESENTED FOR REVIEW

Whether the creditable evidence in the record below supports the compensatory damages awarded to the Appellants after recomputation of the same by the District Court were in accord with the mandate of this Court.

PRELIMINARY STATEMENT

It is suggested that no one, including the Court below, quarrels with the law of damages as enunciated by this Court, for application in the instant case.

The Court stated:

> "In actions under §303, the courts held that '[w]hile the employer must prove that he has sustained some injury to his business or property, he need not detail the exact amount of damages suffered. It is sufficient if the evidence supports a just and reasonable approximation' (512 F. 2d 383(1975) Pg. 389)."

As to the instant case, this Court stated:

> "In light of these principles, we remand to the district court for a reassessment of plaintiffs' damages. The district court obviously found Iodice's testimonial and documentary evidence insufficient to establish precisely how much profit was lost from 1963 until 1969. However, the court did find that during that time the union had engaged in a largely successful campaign to keep business away from Iodice. 345 F. Supp. 248, at 254-55. On remand the district court should 'make a just and reasonable estimate of the damages [suffered by Iodice and Thornwood]based on relevant data,' Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-65, 66 S. Ct. 574, 580, 90 L. Ed. 652(1946), including the testimony of Iodice and of customers, and evidence of profits realized by Pleasant Excavators after the unfair labor practices had ceased."

It is respectfully submitted that this Court did not direct what the lower Court must do, but sought only to guide

it by reiterating the law, again leaving to the lower Court to apply the facts as it found them, as the trier of the facts.

Thus the direction of this Court, to the lower Court as quoted above, was to search again for evidence to support a just and reasonable approximation of damages sustained; of course, in the opinion of the Court below, upon creditable evidence.

Twice the lower Court has pointedly concluded that the plaintiff Iodice gave no creditable evidence nor even tried to do so.

It is further respectfully submitted that, though Pleasant Excavators, which the lower Court found was the same, as Iodice and Thornwood,-the "...firm changed, the business remained the same...", Iodice and Thornwood profited by the Union's action.

It is further suggested that Pleasant Excavators, being the same company, could not be a "yardstick" company.

Lastly why should this Court, or the lower Court go looking for the approximate damage when Iodice, without explanation or excuse failed to produce available evidence of damage, if any there be.

POINT I

THE LOWER COURT FOUND PLAINTIFF'S TESTIMONY INCREDIBLE

The lower Court, initially stated:

"The proof of Iodice's and Thornwood's gross profits rested on two forms of evidence; various exhibits allegedly indicative of the business performed by Iodice and Thornwood during the relevant period, and the testimony of Iodice himself based on his own personal recollections of the business performed and upon his claimed expertise as to the costs involved in his type of business. Neither form of evidence offered withstands examination.

The documentary evidence offered by plaintiffs consists of slips of paper which only generally refer to moving jobs allegedly performed by Iodice or Thornwood. These slips neither are invoices nor formal internal accounting records. It was admitted that the significance of the information on many of the slips is unclear and even duplicative in some instances. Elements of cost are not indicated. These slips cannot be used to determine Iodice's or Thornwood's gross profits.

None of the plaintiffs offered their books and records. There was testimony that during the weekend after the start of the trial the office shared by Iodice, Thornwood, and Pelham, at 10 Walnut Place, Thornwood, New York, was burglarized and that all of the books and records were stolen. Further supportive documentation, it was claimed, therefore, could not be produced. Some issue was made by the defendants as to the veracity of this burglary claim.

Assuming, however, that the burglary occurred, plaintiffs certainly did not avail themselves of all the alternative modes of proof open to them.

For example, it was testified that tax returns were filed by the plaintiffs. Yet copies of these returns were not produced, nor was any indication given by counsel that additional time was required to obtain such copies. Former bookkeepers were not called, nor, with one exception, was their unavailability accounted for. All of this is not meant to suggest that plaintiffs were required to adduce any particular item of evidence. It was entirely within their province to determine how to proceed with their case. It is intended only to note the inadequacies of the approach followed.

In the main the testimony relied upon to prove damages was Iodice's. This too fell short.

That Iodice's testimony was self-serving is an obvious point that must be kept in mind. The interest of a witness is an important element in determining his credibility and reliability. To be sure, testimony is not to be rejected automatically and solely on the grounds of interest. Here, though, Iodice's testimony founders on too many other shoals to permit the self-interest factor to be considered lightly.

Iodice was asked to give testimony concerning his gross profits and Thornwood's during the years in question. In response he offered only imprecise figures based purely on his own admittedly indefinite recollection. Iodice need not have been as uncertain as he was. The books and records were assertedly stolen, but the alleged burglary did not take place until just a few days before Iodice was called to testify. Iodice knew that he was scheduled to take the stand soon; his attorney had asked him to prepare for that event. Yet, though he said he did go over some of his testimony in his mind, he also testified that he intentionally did not review the books and records although they were readily available to him in his office. Iodice conceded that the books and records would have provided more accurate information than his unaided recollection, but incredulously, he explained that he did not look at the books and records

> because he wanted to see how good his recollection was. Therefore, he testified, he did not bother to consult the books and records. In his words he did not deem verifications of his recollection in this matter 'important' - even though he knew he was going to be examined shortly about matters recorded therein.
>
> On the other hand Iodice also testified to the costs of doing business as a mover of heavy construction equipment. In addition to his recollection Iodice relied on his alleged expertise here. For a given amount of business in terms of dollars, Iodice estimated the amount of costs involved. Again, however, he seemed to approach so important an inquiry in an incredibly offhand manner. He admitted making his calculations only on the witness stand. On cross-examination Iodice was asked how he derived these costs. He answered by stating that he had asked his attorney what elements of costs 'should' be included in making his calculations(Transcript p. 728)
>
> Iodice's self-serving testimony is so completely unsupported, unreliable and frivolous as to preclude a finding of actual loss, except upon the sheerest speculation(Record 80aa-84aa, Iodice v. Calabrese, 512 2d, 383)."

Thus while the law of damages allows evidence of a just and reasonable approximation,would this Court compel the lower Court to make a just and reasonable approximation upon "---completely unsupported, unreliable and frivolous---" evidence.?

It is respectfully submitted that this Court would not so direct, nor so find.

POINT II

THIS COURT DID NOT DIRECT THE LOWER COURT TO FIND PLEASANT EXCAVATORS AN APPROPRIATE "YARDSTICK"

While this Court advised the lower Court that profits realized by a "Yardstick" company could be used to measure damage, it most certainly did not itself find that Pleasant Excavators was an appropriate yardstick company. The most this Court did was to direct the lower Court to consider the "yardstick" method of measuring damage and consider Pleasant Excavators as a possible yardstick, if the evidence supports the conclusion that the Company was, in fact, a yardstick.

The lower Court specifically considered this Court's advise as to the law and found Pleasant Excavators not to be a yardstick company.

It is respectfully submitted that the lower Court, as the trier of the fact, was most able to make a judgement and this Court most reluctant to substantiate its opinion on such an evidentiary question. It would not be amiss, in this respect, to again consider the Court's opinion of the Iodice testimony, particularly because Pleasant Excavators was an Iodice Company, the lower Court stating:

> "At the end of 168 or the beginning of 1969 Pleasant Excavators and Equipment Rental Company, Inc., another corporation owned by Iodice's sister Elissa Guiliano, was organized. Pleasant's business is the same as was Thornwood's. Here, too, Iodice works for Pleasant as a manager and truck driver, just as he did for Thornwood. Again, while the

form change, the business remained the same with Iodice in charge.

Iodice, Thornwood and Pleasant all have had the same business address, namely, 10 Walnut Place, Thornwood, New York."

POINT III

PLEASANT EXCAVATORS COULD NOT BE A YARDSTICK COMPANY SINCE IT WAS THE SAME COMPANY AS THORNWOOD AND IODICE

In Point II, since the Court below found that Pleasant Excavators was the same company as Thornwood and Iodice, it is respectfully submitted that it could not be another company to be used as a yardstick company.

In truth, as the Court below said, it was the same company in the same kind of work as Thornwood and Iodice and, in truth, Iodice and Thornwood profited by the claimed wrong, in effect, going around the Union and succeeding the more, perhaps because of the claimed wrong.

POINT IV

IT IS REASONABLE TO CONCLUDE THAT PLEASANT EXCAVATORS MADE ANY PROFIT THORNWOOD OR IODICE MIGHT HAVE MADE

It is to be noted from the quote at the end of Point II, that when Pleasant Excavators was formed, it was owned by Iodice's sister, as was Thornwood,and as the Court said "again while the firm changed, the business remained the same with Iodice in charge."

Again, since Iodice's testimony as to his claimed losses has been found incredulous and "unsupported, unreliable and frivolous" Pleasant's claimed profit was his, Iodice's company, in which he and his sister shared as in Thornwood, and Iodice individually, before the advent of Pleasant Excavating.

POINT V

"THE MOST JUST AND LEAST SPECULATIVE AWARD" BUILT UPON INCREDULOUS TESTIMONY COMPLETELY UNSUPPORTED, UNRELIABLE AND FRIVOLOUS CANNOT SUSTAIN THE INCREASED AWARD HERE UNDER REVIEW. AN AWARD MAY NOT BE FASHIONED SUBJECTIVELY SO AS TO BE "THE MOST JUST AND LEAST SPECULATIVE" IN AN EFFORT TO BE SUBJECTIVELY "EQUITABLE" IN CONFLICT WITH ESTABLISHED PRINCIPALS OF LAW.

It is clear that the lower Court felt obligated to find an increased amount of damage because of the remand. It is respectfully submitted that the Court felt compelled to do so, by reason of an incorrect interpretation of the language of this Court in its decision on remand.

This Court did not define the law to be that, if a wrong is committed, some damage must be awarded. This Court simply reminded the lower Court that creditable evidence could be used to approximate damage and that damages could be measured by comparison with the profits of a Yardstick company.

On remand the lower Court, on the evidence, concluded that Pleasant Excavators was not a Yardstick company. It was the lower Court's duty to make such a fact determination and it did so. However in an apparent stretching of its own intellect, perhaps induced by this Court's misunderstood language of remand, it computed increased damage, predicated, in part on the testimony of Iodice, which testimony the lower Court in

its first decision found incredulous and totally unworthy of belief and in its decision, now on review again stated:

> "To establish their respective profits during the relevant period, plaintiffs did not offer their books and records. There was testimony at trial that during the weekend after trial commenced, the office where the records were kept was burglarized and that all of the books and records were stolen. Supportive documentation, it was claimed, could not be produced. Proof of plaintiffs gross income, costs and profits were primarily based on Iodice's testimony although a collection of invoices were introduced allegedly representing some business done by Thornwood.
>
> Iodice presented only imprecise figures based solely on his own admittedly indefinite recollection. In fact, Iodice intentionally did not look at the companies' record when preparing his testimony, although he had access to them. Rather, he testified that the books and records 'are better than my recollection'. Tr. 585. Later, in response to the court's question about the Iodice's failure to review the records Iodice responded:
>
> 'I didn't think it was really important. I thought the attorney would have the books and he would produce whatever was needed. I more or less just estimated what I thought would be correct.
>
> THE COURT: Don't you think that if you were so concerned about being correct that you would have wanted to look at the books?
>
> THE WITNESS: I thought it would be more important for the attorney to take care of all that than me.'
>
> Tr. 635-636."

Then from such incredulous testimony, the Court below in the decision under review stated:

> "Although the court has no reasonable or non-speculative external measure for establishing damages during the relevant period, the court is satisfied that an equitable award can be made by comparing profitability during the period of stability, 1963 through 1965, with profitability during the period of ascertainable loss, 1966 through 1968. The most just and least speculative award may be fashioned by this method."

It is respectfully submitted that such an award is in error as a matter of law because it "has no reasonable or non-speculative external measure for establishing damages."

An award may not be fashioned subjectively so as to be "the most just and least speculative" in an effort to be subjectively "equitable" in conflict with established principals of law.

POINT VI

SHOULD THE PLAINTIFFS PREVAIL BECAUSE THEY FAILED TO PRODUCE AVAILABLE EVIDENCE?

As the lower Court pointed out, the failure of the Iodice to produce available evidence and to rely on questionables when available precise testimony was available was incredulous. Will this Court reward him by a devised questionable concept of equity because defendant wronged the Plaintiffs?

Is it not equally as likely that Plaintiffs lost some business by the wrong committed by the Union and gained more from his stand against the Union and thus suffered no damage whatsoever?

CONCLUSION

The lower Court misconstrued the remand of this Court and relied on incredulous, unsupported, unreliable and frivolous testimony to fashion an "equitable" award. A totally unsupported equitable award is not a substitute for an approximate measure of damages, measured upon creditable evidence.

Its initial decision and award should be reinstated.